IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT.

Heer Singh vs. Jeewan & ors.

S.B. Civil Second Appeal No. 67/1983 under Section 100, C.P.C. against the judgment and decree dated 18.2.1983 passed by the learned District Judge, Merta in Civil Appeal Decree No.60/76

Date of Judgment: December 08, 2005.

PRESENT

HON'BLE MR. PRAKASH TATIA,J.

Mr. M.D. Purohit, Senior Advocate withS hri Anand Purohit, for the appellant.

Mr. Jitendra Chopra, for the respondent.

BY THE COURT:

Heard learned counsel for the parties.

Brief facts of the case are that plaintiff-appellant filed a suit for mandatory injunction against the three defendants and subsequently, impleaded Gram Panchayat as party when the plaintiff came to know that defendants no.1 to 3 obtained '*patta*' from the Gram Panchayat for the land in dispute. The plaintiff challenged the '*patta*' issued by the Gram Panchayat in favour of defendants no.1 to 3. The suit of the plaintiff was dismissed by the trial court because no notice as required under Section 79 of the Panchayat Act was served upon the Gram

Panchayat. Being aggrieved against the judgment and decree of the trial court dated 10.9.1976, the plaintiff-appellant preferred appeal. During the pendency of the appeal, one of the co-owners of the property Poosa Ram died. No steps were taken for bringing on record the legal representatives of said Poosa Ram by the plaintiff-appellant before the first appellate court. Admittedly, defendants no.1 and 3 are the brothers of deceased defendant no.2 and not the legal representatives of Poosa Ram. No steps were made for getting the abatement set side and ultimately the first appellate court by judgment and decree dated 18.2.1983 held that since the trial court's decision is in favour of deceased Poosa Ram and in case decree will be reversed then there will be two conflicting decrees for the same property for which a *Patta* has been issued by the Gram Panchayat in favour of three defendants.

It will be worthwhile to mention here that in the plaint, the plaintiff not only alleged that the defendants are intending to construct and want to obstruct the way of the plaintiff but has also challenged the Patta on the basis of which all the defendants claimed their right over the property in dispute. According to the learned counsel for the appellant, even if no relief for cancellation of Patta can be granted to the plaintiff in view of the death of one of the defendants, co-owner of the property even then if the plaintiff succeeds in proving his case for

any other right like easmentary right against the remaining defendants then the relief can be granted in favour of the plaintiff against the remaining defendants who are obstructing the easmentary right of the plaintiff. Therefore, there will be no conflicting decree because the grant of Patta in favour of those persons for the land in dispute is a separate matter and even when the Patta remains, still the plaintiff can pray for his easmentary right over this property.

I considered the submissions of the learned counsel for the appellant and perused the record also.

It is clear from the facts mentioned in the plaint itself that the plaintiff himself admitted that Patta was issued by the Gram Panchayat in favour of defendant nos.1, 2 and 3, therefore, they are the joint owners of the property,therefore, the plaintiff cannot maintain suit for easmentary right against only two of owners out of three. The plaint allegations reveal that all the defendants, even according to the plaintiff himself, jointly by exercising their right flowing from the Patta are challenging the right of the plaintiff. It is not in dispute that the decision on issue given against the plaintiff and which went in favour of defendant no.2, became final because of death of Poosa Ram.

In view of the above, any decree if will be passed will certainly affect the property right of the legal representatives of the deceased Poosa Ram and, therefore, the first appellate court was right in holding that the suit stands abated against all the three persons in the facts of this case and the suit filed by the plaintiff in the facts of the case cannot be considered to be a suit simplicitor for injunction against individual tortfeasor.

Apart from it, it is not in dispute that the plaintiff sought cancellation of Patta which was issued by the Gram Panchayat and no notice has been served upon the Gram Panchayat as required under Section 79 of the Panchayat Act, therefore, also the dismissal of the suit by the trial court was just and proper.

In view of the above, the substantial question of law framed by this Court on 2.5.1983 is decided against the appellant. Consequently, the appeal of the appellant is dismissed.

(PRAKASH TATIA),J.

mlt.